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No. 00-417

In The

Supreme Court of the United States

MICHAEL C. WORSHAM,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER IN SUPPORT OF A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Telecommunications Act of 1996, Section 704 preempted State and local control over wireless facilities cellular phone towers on the basis of the "environmental effects" of radio frequency emissions that comply with the Federal Communications Commission regulations concerning such emissions. Sections 601(c) expressly prohibited implied preemption. Section 253(b) preserves certain state regulation authority over public safety and welfare even if such regulation may create barriers to entry of telecommunications services.

1. Whether the Federal Communications Commission may imply preemption of local control and regulation over the "health effects" of radiation from wireless facilities, when the Telecommunications Act of 1996 expressly prohibits implied preemption, and only preempts local control over the undefined term "environmental effects."

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REPLY TO RESPONDENT AND REASONS FOR GRANTING THE WRIT

The *amici curiae* briefs filed in this case emphasize the significant importance of the health preemption issue raised by Petitioner. These briefs express the tremendous concern by Americans across the country over the health effects from wireless radiation, and loss of local control over health issues, and that these concerns are often the prime reason for citizen objection to cellular tower sites. See *amici curiae* briefs of U.S. Senator Patrick J. Leahy et al. at 5-6, the Concord Citizens for Responsible Tower Siting et al. at 5-20, Town of Lincoln, Massachusetts and the Lincoln Planning Board at 4-5, and Town of Islip et al. at 3-4. The FCC did not attempt to deny this concern.

These citizens' understandable concern is heightened when the health threat is from invisible radiation they cannnot control. Citizens' ability to control a threat to public health should not be taken away from those most entrusted and responsive to public health concerns – local officials, boards and agencies – without a clear manifestation of Congressional intent to do so, and unless carried out by an agency with the proper expertise. The 1996 Telecommunications Act ("Act") failed to provide adequate Congressional intent.

The development of a wireless infrastructure accelerated by the 1996 Act has increased public exposure to microwave radiation. Significantly, the radiation emitted from cellular towers is not the typical pollutant arising as an undesirable byproduct of an industrial manufacturing process. Rather, it is the commercial product itself, being sold to increasingly large numbers of Americans who buy

cellular phones, and more recently, wireless Internet computers. Secondly, microwave radiation also differs substantially from typical pollutants in that it can penetrate through trees, cars, buildings and into almost every nook and cranny of the American landscape.

A third substantial difference between microwave radiation and typical pollutants is that as a consequence of the radiation being the product itself, wireless service providers have a strong financial incentive to increase, rather than decrease, the amount of radiation emitted. The FCC, which regulates this radiation, is not a health or environmental agency, a point the government concedes. Resp. Brief at 21-22. As a result, oversight of an industry financially motivated to distribute an invisible, highly penetrating, and harmful product is – under the FCC's interpretation of the Act Petitioner challenges – limited to a federal agency without expertise in public health and environmental matters. This situation could compromise public health, and requires Court review.

I. There Exists An Assumption Against Preemption In Areas Of Health

The lack of FCC expertise in health or environmental matters increases the importance of this case, and augments the general presumption against interpreting statutes to preempt state law concerning health and safety. *Mauer v. Hamilton*, 309 U.S. 598, 614 (1940). The FCC argues that the exception to the general presumption against health and safety preemption is present here because Congressional intent was "clearly indicated by

those considerations which are persuasive of statutory purpose." Resp. Brief at 11-12 (citing *Mauer* at 614).

The FCC finds clear Congressional intent in a single House Report discussing Section 704 of the Telecommunications Act, which made a reference to local interference with wireless systems for reasons that were "at times not supported by scientific *and medical evidence.*" Resp. Brief at 11, n. 6 (citing H.R. Rep. No. 204 at 95) (emphasis in Resp. Brief). However, this and other references to public health were completely removed by the Senate in the Joint House-Senate Conference Report, reprinted in the Brief of Respondent Bill Jenkins at 53-56.

In *Mauer* this Court also found "other cogent reasons" why the section of the statute at issue could not be given a broad interpretation and preemptive effect, one of these being a previous hesitancy by Congress to interfere with state highway regulation. 309 U.S. at 614. Similarly, the instant case raises other cogent reasons: the previous statutory distinction by Congress of the phrases "health effects" and "environmental effects" (see Petitioner's (Pet.) Brief at 13-14, and again, *infra*), and the FCC's admitted lack of expertise in health and environmental matters.

The FCC's response supports Petitioner's point that the directive in Section 704(b) regarding completion of the ET Docket was insufficient Congressional direction: "Section 704 was not the source of the FCC's authority to act in this case, but is instead simply a congressional requirement that the FCC timely resolve an ongoing rulemaking. Resp. Brief at 19-20. In other words, according to the FCC, Congress simply told the FCC to hurry up

an ongoing rulemaking. Being told by Congress to timely complete an ongoing NEPA process, in no way creates clear Congressional intent to preempt traditional local control over health and safety matters. To preempt health issues Congress must pass statutory language clearly evincing an intent to federally preempt health effects. What Congress did was pass a provision in Section 601(c) of the Act, which explicitly prohibits the type of implied preemption which the FCC would have this Court read into the statute. As Petitioner argued in his Brief, the FCC's position and the Court of Appeals' decision turns traditional preemption analysis on its head, and improperly puts the burden on the state or local entity to establish Congressional permission, rather than on the agency seeking preemption to establish clear Congressional preemption.

II. Contrasting Federal Court Decisions

The rationale of why the Court of Appeals included "health effects" within "environmental effects" is explained in contemporaneous Second Circuit opinion. Two of the three Second Circuit Court of Appeals judges deciding the case below, *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), also decided *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2nd Cir. 2000), and wrote the opinions in those cases which were both issued in February 2000.

The opinion in *Cellular Phone Taskforce* equated health and environment, stating without discussion that: "In the Second Order that is at issue in this case, the FCC announced, inter alia, a rule that prohibited state and

local governments from regulating any personal wireless service facilities based upon perceived health risks posed by RF emissions as long as the facilities conformed to the FCC Guidelines regarding such emissions." *Cellular Phone Taskforce*, 205 F.3d at 88. In *Freeman*, the Second Circuit discussed the term "health and safety":

> This term is used in conjunction with the term "environmental effects," which is not defined in the statute but most likely refers to the already-existing requirement that the FCC prepare an Environmental Assessment in connection with the grant of a license. See 47 C.F.R. § 1.1307 (1998). The environmental effects specified by the regulations do not include RF interference, but rather focus on degradation of the natural environment, effects on historical landmarks, and the biological effects of RF radiation.

204 F.3d at 325. The FCC argues that the opinions in the two Second Circuit cases do not conflict, and that further review is unwarranted. In fact, these opinions from the Second Circuit highlight the difficulty in discerning Congressional intent from the undefined term "environmental effects." This Court should decide the issue because further review by the Second Circuit would be fruitless.

The FCC highlighted the words "biological effects of RF radiation" in the above cited passage. Resp. Brief at 12. Petitioner notes that the words are from a passage which was the Second Circuit's best guess at what the statutory words "environmental effects" meant. They are taken from a section of the Code of Federal Regulations, which as the FCC itself noted, are part of an already-

existing requirement to perform an Environmental Assessment (EA) pursuant to the National Environmental Policy Act (NEPA), which predated the preemptive language at issue from the 1996 Act. Neither an EA or Environmental Impact Statement (EIS) was done as part of the FCC's rulemaking being challenged. This Court should review whether Congressional preemption can be inferred from a pre-existing requirement for an agency to consider environmental impacts under NEPA when that agency has not even performed an EA or EIS.

The FCC did not address the case outside the Second Circuit that distinguished "health effects" from "environmental effects." Petitioner repeats the pertinent statement from *Iowa Wireless Services, L.P. v. City of Moline, Ill.*, 29 F.Supp.2d 915, 924 (C.D.Ill. 1998): While it is clear from the record that the City of Moline considered potential *health effects* of the tower, it is less clear that they considered *environmental effects*. *Id.* (emphasis in original). This discussion is clearly in contrast to the Second Circuit, and again shows how Federal Courts have struggled to define the term "environmental effects." That two other Federal Circuit Courts mentioned by Petitioner have also declined to delve into this issue, Pet. Brief at 12, suggests that this Court should determine what Congress preempted regarding local regulation of "environmental effects" of RF radiation.

III. Congress Has Distinguished Health Effects From Environmental Effects

The FCC brushes aside Congress's previous disjunctive use of the terms "environmental effects" and "health

effects" in environmental statutes as being "of no moment. Resp. Brief at 12. Petitioner again points out the sections of environmental statutes in which Congress has distinguished terms or phrases which include "health" or "health effects" from "environment" or "environmental effects." See 15 U.S.C. § 2602(6) and especially 42 U.S.C. §§ 7412(a)(7) and (b)(2).

It is well established that "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993) (citation omitted). Congress's own previous definitions in environmental statutes would be a logical source for such an ordinary definition of "environmental effects." The Clean Air Act defines the term "adverse environmental effect" to mean "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." 42 U.S.C. § 7412(a)(7). This definition does not refer to effects on humans. The FCC has not suggested another meaning of "environmental effects" that supports its position that this term includes "health effects."

IV. Nondelegation Doctrine

Assuming arguendo that there might be an interpretation of 47 U.S.C. § 332(c)(7)(B)(iv) to allow FCC preemption of "environmental effects," that interpretation would have to exclude "health effects." This is

because to do otherwise significantly strengthens Petitioner's argument that the Act unlawfully delegated authority to the FCC.

The nondelegation issue was raised below, and the Second Circuit dismissed this and other constitutional challenges out of hand. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96-96 (2d Cir. 2000) ("We have considered petitioners' remaining constitutional arguments and find them to be without merit."). Petitioner notes that the Solicitor General recently petitioned for certiorari, which this Court granted, on the nondelegation issue, despite the fact that the court of appeals relied "on a theory that the parties had not extensively briefed." See Respondent's Brief in *Browner v. American Trucking Ass'n, Inc., cert. granted*, ___ U.S. ___, 120 S.Ct. 3129, 147 L.Ed.2d 231 (2000), Supreme Court Docket No. 99-1257 at 15.

Petitioner pointed out that this Court has cited with admiration the principle regarding Congressional delegation of power that "If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 408 (1928) (citation omitted). The FCC's Opposition Brief ignored this important point.

The restriction of power to an agency with particular expertise is to avoid the problem of determining who is actually minding the public interest. This problem is illustrated by other Petitioners who question whether the FCC can monitor the rapidly developing field of radiofrequency health by relying on agencies, such as the Environmental Protection Agency (EPA), the agency

authorized to provide guidance to all Federal agencies in forming radiation standards. 42 U.S.C. § 2021(h). Since the FCC is not an agency devoted to health issues, and the EPA is the authorized agency for developing radiation standards, Congress's delegation to the FCC in the 1996 Act is unconstitutional.

This Court should hear this case to decide whether Congress can delegate rulemaking and preemptive authority to non-expert federal agencies based on general grants of authority and standards. The FCC states that its authority to act here does not arise from section 704 of the 1996 Act, but rather, that it "acted under its broad authority to regulate communications conveyed by the Communications Act of 1934," and "pursuant to 47 U.S.C. § 307(a), which accords the agency authority to grant licenses 'if public convenience, interest, or necessity will be served thereby.' " Resp. Brief at 20. However, the cases relied on by the FCC to support delegation under such broad grants of authority do not support FCC rulemaking authority in areas where it has no expertise.

National Broad. Co. v. United States, 319 U.S. 190 (1943) and *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940) are over half a century old, when, as the FCC itself recognized, the potential health effects of RF fields were unknown. Resp. Brief at 24, n. 13. *Pottsville* was about a permit to construct a broadcasting station, an area clearly within the FCC's authority. *National Broad. Co.* addressed regulations "in the public interest" which governed the grant of licenses to stations that are part of networks, again an area where the FCC has clear authority. These cases differ drastically from the instant case, where the

health standard and corresponding preemption are in the area in which FCC admits it has no expertise.

Thus, the FCC finds authority for itself in its 1934 enabling legislation, and the relatively concurrent cases of that time discussing the "public interest" in non-health contexts, to develop a national health standard in an area it admittedly has no expertise in and for which no further Congressional direction has been provided – other than to hurry up. This Court should hear this case both to curb further expansion of the FCC's power, and to signal to Congress the need for clear instructions to federal agencies expected to carry out important Congressional directives, especially preemption of health issues.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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